STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
Markey, P.J., Cavanagh and R.P. Griffen, JJ.

JULIE NEAL,

Plaintiff-Appellee,

v

TERRY WILKES,

Defendant-Appellant.
_____/

Supreme Court No.: 122498

Court of Appeals No.: 230494

Eaton County File No.: 99-968-NO

BRIEF OF PLAINTIFF- APPELLEE

ORAL ARGUMENT REQUESTED

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FILED

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STATUTES

MCL 324.73301, MSA 3A.73301

MCLA 300.201, MSA 13.1485

1953 PA 201

1964 PA 199

JUDGMENT BEING APPEALED AND RELIEF SOUGHT

Defendant has filed an application for leave to appeal the order of the Court of Appeals released September 17, 2002 which reversed the Eaton County Circuit Court's order dated September 1, 2000 granting Defendant's Motion for Summary Disposition and remanded the case to the trial court.

In light of this ruling the Court of Appeals held it did not decide the remaining issues appealed by Plaintiff.[1]

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[1] Plaintiff's appeal also addressed: 1) Did the trial court err in allowing Defendant to amend to add immunity under the Recreational Land Use Act as an affirmative defense that was not pled in his first responsive pleading as required by MCR 2.116(D)(2), of which Plaintiff had no notice, on the eve of trial and in denying Plaintiff the same opportunity to amend to plead an exception to it?; and 2) Did the trial court err in its cumulative rulings?

STATEMENT OF QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS ERR IN RULING THAT THE RECREATIONAL LAND USE ACT DID NOT APPLY TO PLAINTIFF'S CLAIM FOR CATASTROPHIC INJURIES SUSTAINED ON THE WELL GROOMED LAWN IN DEFENDANT'S BACKYARD THAT WAS NOT OPEN TO THE GENERAL PUBLIC FOR RECREATIONAL USE WHILE THERE FOR THE PURPOSE OF A SOCIAL VISIT?

Plaintiff-Appellee answers: NO

Defendant-Appellant answers: YES

Court of Appeals answered: NO

STATEMENT OF FACTS

1. Introduction

This premise liability action arises out of catastrophic injuries sustained by Plaintiff, a social guest in Defendant's backyard while riding as a passenger on an all-terrain vehicle (bikes) owned by Defendant and driven by his brother, Kim Norman. The trial court dismissed Plaintiff's entire action pursuant to the Recreational Land Use Act " MCLA 324.73301 (hereinafter "RUA") and denied any amendment by Plaintiff to allege gross negligence as futile. The Court of Appeals recognized that the RUA does not apply to the facts of this case. The Defendant admits that he kept the area where Plaintiff was injured mowed, well maintained and well groomed and that he had mowed this lawn earlier in the day.

2. Factual Chronology

On July 9, 1998, Plaintiff was a social guest on the Defendant's property. Defendant's brother, Kim Norman and Defendant's girlfriend, Elizabeth Sanchez were also there as social guests. (Plaintiff Deposition pp. 38.5, 39:1; Defendant Deposition p. 20:5-6). It is uncontroverted that Plaintiff went there "to visit". (Plaintiff Deposition 38:5, 38-18-20). Defendant admits that this was "just a get together" to "just talk". (Defendant Deposition p. 20:3-6) There were no specific plans or planned activities. (Plaintiff Deposition p. 38:4-5)

Defendant's home is located on a 12-acre parcel of property on the outskirts of Lansing. Neighbors surround each side of Defendant's home. In addition to his home, Defendant has several other structures in his back and side yards. The Defendant's

backyard consists of a large lawn area that is followed by a wooded area. (Exhibit 1, Defendant Deposition p. 18:6). It is uncontroverted that the Defendant mowed, maintained and groomed the lawn. (Defendant Deposition p. 14:19-25; 26:3-45; 27:1-4). The Defendant had mowed the lawn in this backyard prior to Plaintiff's arrival that day. (Defendant Deposition p. 26:13). The Defendant also maintains the trails in the wooded area of his property. He brought hedge cutters into the woods to cut the trail area that he made on the property. (Sanchez Deposition p. 14:6-8; 14:19-25)

When Plaintiff arrived at Defendant's home she sat in lawn chairs in the driveway and chatted for about an hour with Defendant's brother, Defendant and his girlfriend. (Plaintiff Deposition p. 39:1-3; 10-12; Sanchez Deposition p. 11:3-7) The Defendant and his brother were talking about the bikes. The conversation quickly turned into going for rides on the bikes. Later the Defendant brought out his two four-wheeled bikes and the four went for rides in Defendant's backyard. (Plaintiff Deposition p. 46; Sanchez Affidavit; Norman Deposition p. 12:23). Defendant was aware that Plaintiff had never ridden much less driven a bikes. (Sanchez Deposition p.12:23-25) There was no discussion about teaching Plaintiff how to ride the bike. (Sanchez Deposition p. 12:25,13:3-5; Plaintiff Deposition p. 45:9-14, 46:11-13) Defendant did not tell Plaintiff about riding as a passenger on the bike.[1] Defendant also did not advise or warn Plaintiff about the ridged area on his lawn in his backyard. (Defendant Deposition p. 28:22)

On the first ride Defendant's brother went in the area of a ravine and Defendant told him not to drive in that area again. (Plaintiff Deposition p. 51:6) After about 10

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[1] Defendant knew that these bikes were not to be ridden double and that it was unsafe. (Defendant Deposition pp. 21-23)

minutes of riding they rode the bikes back to the house. (Plaintiff Deposition p. 54:7-9) The Defendant did not tell Plaintiff or his brother to put the bikes away. (Plaintiff Deposition pp. 51:21-23; 52:21-25; 56:15-17). To the contrary, after chatting in the driveway for about 15 or 20 minutes Defendant's girlfriend took Plaintiff for a short ride in the backyard with Defendant's knowledge. (Plaintiff Deposition p. 54:23-25; Sanchez Deposition 18:1-11; 36:10-11) When they returned to the house Defendant's girlfriend left. Thereafter, the Defendant's brother took Plaintiff for another ride. On the way back to the house the bike was driven over deep ridges on the back part of Defendant's lawn causing Plaintiff to bounce up and slam back down into the seat. Plaintiff was injured on a ridged area of the lawn in Defendant's backyard. (Exhibit 1; (Deposition of Plaintiff pp. 63:18-23; 64:18-20, 66:17-19). <u>This is undisputed</u>. (Defendant Deposition p. 27:22; Plaintiff Deposition p. 66; Sanchez Deposition pp. 31,45-46, Norman Deposition pp. 22:4)

Plaintiff took three rides as a passenger on Defendant's bike as follows:

1) <u>FIRST RIDE</u>: Plaintiff was a passenger with Defendant's brother. (Plaintiff Deposition p. 46:6)

2) <u>SECOND RIDE</u>: Plaintiff took a short ride as a passenger with Defendant's girlfriend. (Plaintiff Deposition pp. 52:7-17; 56:21).

3) <u>THIRD RIDE</u>: Plaintiff was a passenger on a short ride with Defendant's brother. Plaintiff was <u>injured on this third ride back to Defendant's house on the ridges in his lawn</u>. (Plaintiff Deposition pp. 58:24; 59:1-8; 59:22-24)

Defendant consented to all of these rides, he knew about them, allowed them

and he was there when they occurred. (Sanchez Deposition pp. 13:13; 35:7). After the first ride, Defendant told his brother not to go into the ravine again. (Plaintiff Deposition p. 51:4-9; Sanchez Deposition p. 42:16-20). Defendant never told anyone not to ride again and he knew and consented to the additional rides that occurred. (Plaintiff Deposition p. 56:15, Sanchez Deposition p. 35:7) Defendant knew about these subsequent rides because he was there the whole time and Ms. Sanchez asked Defendant if she could give Plaintiff a ride. (Sanchez Deposition p. 37:8)

Plaintiff was injured on the third ride that she took. (Plaintiff Deposition p. 59:20-24). Plaintiff took a short ride with Kim Norman and was on the way back to the house when the bikes hit the ridges on Defendant's lawn, Plaintiff was suddenly thrown up off the seat into the air and crashed back down, causing serious spinal injuries. (Plaintiff Deposition pp. 58-67)

Plaintiff has clearly testified that:

> It was on the lawn-closer. Yeah. Like the back part of his lawn. . . It was part of his lawn.
>
> (Plaintiff Deposition p. 63:18-21, emphasis added)

All of the witnesses agree that the place where Plaintiff was injured was on Defendant's well-maintained and landscaped backyard. (Exhibit 1, Defendant Deposition pp. 26-27, McNure Affidavit; Sanchez Affidavit, Plaintiff Deposition pp. 63:18, 66:1, Norman Deposition p. 22:4) At this location there are several ridges in the lawn. It is located toward the back of his lawn, closer to the woods than his house, near his storage shed and **it is definitely on his lawn and is not in the woods**. By Defendant's own admission, he keeps this area well mowed, well maintained and well groomed and it is not undeveloped by any means. (Defendant Deposition pp. 26-27;

Plaintiff Deposition pp. 66:1; Sanchez Affidavit ¶10) This is also obvious. (Exhibit 1).

Plaintiff did not see or know about the ridges. (Sanchez Deposition p. 45:20, Sanchez Affidavit ¶10, Plaintiff Deposition p. 63-71:2). Defendant, however, knew that these ridges were there, he has mowed them on his riding mower for 13 years. (Defendant Deposition pp. 26:14-27:6). Mr. Norman knew about them. (Norman Deposition pp. 22:16-23:3). Ms. Sanchez knew about them. (Sanchez Deposition pp. 45:20-46:3)

Defendant did not tell Plaintiff about this area and he did not tell her not to ride double although he knew that Plaintiff did not know about either. (Defendant Deposition pp. 28:10-22, 21:8-24)

When Plaintiff hit this area in Defendant's backyard, she was suddenly bounced up into the air and slammed back down on the seat hard, and was immediately in excruciating pain, incurring severe spinal injuries from which she will suffer the rest of her life.[2] (Plaintiff Deposition pp. 67:1-9, 73:17).

The area where the Plaintiff sustained the spinal injuries was on a portion of Defendant's well-manicured lawn which he mowed earlier in that day. (Defendant Deposition pp. 26-27). The lawn in Defendant's backyard is mowed, well maintained and well groomed by Defendant's own admission. (Defendant Deposition pp. 26-27). The area of Defendant's backyard is not undeveloped by any definition. (Defendant Deposition pp. 26-27).

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[2] Plaintiff suffered compression fractures that shattered several vertebrae and herniated discs in her back. She has had two significant surgeries, the first resulting in a collapsed spine and the second resulting in substantial hardware implanted in her back and chest, a hunched over posture, difficulties with walking, sitting, bending, driving and daily pain.

3. Procedural Chronology

On August 5, 1999, Plaintiff filed her Complaint (Exhibit 6) against Defendant asserting claims in the alternative for premise and owner liability based on four theories:

1. Defendant was negligent in failing to maintain a safe premises and in failing to warn Plaintiff of the unsafe condition of the land. (Complaint ¶14);

2. Defendant negligently entrusted the ATV to an individual who was incompetent. (Complaint ¶15);

3. Defendant, as owner of the ATV, is vicariously liable for Mr. Norman's negligence, which consisted of:

   a) operating an ATV with a passenger;
   b) failing to make proper observations of the condition of the property;
   c) operating an ATV at a speed too fast for the conditions then existing. (Complaint ¶15);

4. Defendant created or maintained a dangerous condition on the premises which constituted a nuisance. (Complaint ¶23).

On September 24, 1999, Defendant filed his Answer to Plaintiff's Complaint and Affirmative Defenses through his first attorneys Roberts, Betz and Bloss P.C. on behalf of Defendant. The affirmative defense of immunity under the RUA was not pled.

On October 4, 1999, dates were set forth in the Trial Court's Scheduling Order that required motions to amend pleadings shall be filed by January. 1, 2000 and that discovery shall be completed by May 1, 2000.

On November 17, 1999, Defendant amended his affirmative defenses and again he did not assert the defense of immunity under the RUA.

On November 24, 1999, Plaintiff objected to Defendant's unilateral amendment.

On March 6, 2000, Defendant changed attorneys by substituting in attorneys by Worsfold, MacFarlane, McDonald P.L.L.C. into the case.

On April 24, 2000, Defendant's new counsel filed two motions together to: 1) Amend and Add the RUA as an Affirmative Defense and 2) for Summary Disposition based on this new defense. Both motions were noticed to be heard together on May 19, 2000. Defendant's new attorney filed these motions 5 days before discovery closed, they were heard almost 3 weeks later, more than 51/2 months after motions to amend pleadings were required to be brought, 1 week after mediation and on the eve of trial, June 14, 2000. Good cause was required to bring this motion. (Trial court hearing 5/19/00 8:20 – 10, hereinafter "T").

Further and importantly, these motions were filed after all discovery had been completed, after all pleadings and the parties positions had been set and after Defendant had bootstrapped his new Affirmative Defense of the RUA immunity onto his Motion for Summary Disposition to serve as its basis to dismiss this case.

At hearing, Plaintiff's counsel vigorously objected to this amendment because it was too late, "it wasn't originally pled", discovery was over, nothing new had happened, the defense of RUA immunity was known, if it applied, Plaintiff would have conducted discovery differently and Defendant's new counsel couldn't change his at the last minute without prejudicing Plaintiff. (T 3:25, 5:25, 8:20–10)

> The trial court found that the defense of RUA immunity had not been pled but still allowed the Defendant to amend to add RUA immunity as a defense, and it was prepared to address the Motion for Summary Disposition based on the new defense at that time. (T 6:23-7:15; 8:2).

The Motion for Summary Disposition was adjourned for 60 days for additional briefing.

On August 18, 2000, the trial court granted Defendant's Motion for Summary and dismissed Plaintiff's case finding that the RUA applied, dismissed Plaintiff's claims based on the RUA and denied Plaintiff leave to amend an exception to it. (Transcript 8/18/00 14:16-20:1, hereinafter TT)

On September 14, 2000, Plaintiff filed a Motion for Reconsideration. (Exhibit 4)

On October 4, 2000, Plaintiff's Motion for Reconsideration was denied in a written Opinion and Order. (Exhibit 3). In its Order the trial court held that the RUA applied and barred Plaintiff's claims because "Plaintiff's injury took place on a tract of land that was relatively in its natural state, the land was being used for recreational use" and that "there was no evidence of gross negligence or willful or wanton misconduct" to support Plaintiff's request for amendment. (Exhibit 3 at ¶11).

October 23, 2000, Plaintiff timely filed her Claim of Appeal. Following the submission of briefs and oral argument the Court of Appeals issued a per curium decision reversing the trial courts order granting summary disposition and remanding the case to the trial court.

The Court of Appeals held that the Recreational Land Use Act does not apply to the improved portion of the lawn where Plaintiff was injured in Defendant's backyard. The Court recognized that the RUA was not designed to limit liability in residential backyards citing this Court's opinions in *Wymer v Holmes*, 429 Mich 66; 412 NW2d 213 (1987) and *Ballard v Ypsilanti Twp*, 457 Mich 564; 577 NW2d 890 (1998).

ARGUMENT

Defendant's Application for Leave to Appeal attempts to create an appearance of an issue of legal significance regarding the interpretation of the Recreational Land Use Act by ignoring the uncontroverted facts, plain language of the statute, legislative purpose and well established law in hopes of eviscerating the common law of premises liability is grossly misplaced.

The plain, simple and uncontroverted fact is that the purpose of Julie Neal going to Defendant's house was to visit. She did not go for the purpose of engaging in recreational use of Defendant's property. The unequivocal testimony of all witnesses is that the impromptu riding the bikes was incidental to the social visit. It is also uncontroverted that Julie Neal sustained injuries on the lawn that Defendant mowed the very same day and had mowed and maintained for the 12 years that he owned it.

The legal principles with respect to the application of the RUA are well established. The plain language, legislative history and case law clearly establish that there was no intention by the legislature to immunize all outdoor activities much less those occurring on in the backyard of a residential premise that is not available for use by the general public. The statute's plain language specifically addresses the intent of the person entering the land, "any person who is on the land . . . *for the purpose of* . . . and other outdoor recreational use. (Emphasis added). The RUA does not apply to injuries suffered by a social invitee who did not enter the land <u>for the purpose</u> of engaging in a recreational use.

Julie Neal went to Defendant's house "to visit" her friends. The fact that she happened to be outdoors and took a couple rides on a bike while visiting does not

bring her within the purview of the statute.

Moreover, legislative analysis of the statute demonstrates that the legislature intended the statute to apply to vacant land, the very character of which would subject the land to use by the general public for recreational purposes. Plaintiff was injured on the Defendant's developed private property that is not vacant or open to the public for recreational purposes. The RUA under these facts does not apply to Defendant's property.

Finally, RUA does not abrogate traditional premises liability standards as set forth in *Preston v Sleziak*, 383 Mich 442; 175 NW2d 759 (1970).

I. THE COURT OF APPEALS PROPERLY RECOGNIZED THAT THE RECREATIONAL LAND USE ACT DID NOT APPLY TO PLAINTIFF'S CLAIM FOR CATASTROPHIC INJURIES SUSTAINED ON THE WELL GROOMED LAWN IN DEFENDANT'S BACKYARD.

The Recreational Land Use Act MCL 324.73301, MSA 3A.73301 provides:

> Except as otherwise provided in this section, a cause of action shall not arise for injuries to **a person who is on the land of another** without paying to the owner, tenant, or lessee of the land a valuable consideration **for the purpose of** fishing, hunting, trapping, camping, hiking, sightseeing, motorcycling, snowmobiling, **or any other outdoor recreational use** or trail use, with or without permission, against the owner, tenant, or lessee of the land unless the injuries were cause by the gross negligence or willful and wanton misconduct of the owner, tenant, or lessee.
>
> (*Id*. Emphasis added.)

1. PLAIN MEANING OF THE STATUTE – PLAINTIFF'S PURPOSE FOR GOING ON DEFENDANT'S LAND

Defendant totally ignores the plain language and precedential authority interpreting the RUA in his analysis. The plain language of the statute applied to this case states:

> A cause of action shall not arise for injuries to **a person . . .**who is on the land of another**. . for the purpose of** . . . **any other outdoor recreational use . . .** OR unless the injuries were caused by the gross negligence or willful and wanton misconduct of the owner . . . (*Id.* Emphasis added.)

The legislature in the amendments to the Michigan statute used the term "use" rather than a term such as "activity". A "use" in the context of the statute implies a specific purpose to which the land is applied, rather than mere presence upon the property. In the case at bar the Defendant's land riding bikes is not a specific purpose to which the land is applied. The specific use for Defendant's property is a private residential home.

The statute also addresses the intent of the person entering the land, namely "any person who is on the lands...*for the purpose of*...any other outdoor recreational use..." (Emphasis added). To bar a plaintiff's cause of action the statute requires a finding that the injured person came upon the land with the specific purpose of using the land in a recreational manner. The language of the statute and the legislature's intent does not apply to social invitees who, incidental to a social visit may stroll across the invitor's backyards, lounge on the invitor's backyard deck, swim in the invitor's swimming pool, or play a game of badminton, horseshoes or tennis on the invitor's lot.

There is well-established law that applied the plain meaning of the RUA which should be properly applied to the facts presented to the Court in this case.

First, the RUA bars suit only when the injured person enters the land "for the purpose of" an outdoor recreational use. In *Thomas v Consumers Power Co*, 58 Mich App 486, modified on other grounds, 394 Mich 459, 495-496; 228 NW2d 786 (1975) the plaintiff was on the land of the Saginaw County Agricultural Society for the purpose of snowmobiling, in *Syrowik v City of Detroit, 119 Mich App 343; 326 NW2d 507 (1982),*the plaintiff was on the Dorias Playfield for the purpose of tobogganing. In *Winiecki v Wolf, 147 Mich App 742; 383 NW2d119 (1986)* the plaintiff was visiting relatives brought "land skis" onto Defendants' property which were used to play a land ski game down one of Defendants' hills. The Court of Appeals found that Plaintiff had come upon Defendants' land "for the purpose of an outdoor recreational use", and therefore MCL 300.201 provided immunity.

In the case at bar, it is uncontroverted that Julie Neal did not go to the Defendant's residence for the purpose of engaging in any outdoor activity or the recreational use of Defendant's property. Julie Neal went to visit the Defendant at a "get together". The use of the bikes was secondary, of short duration and an insignificant part of the visit.

Second, the use to which the land is put must be an " outdoor recreational use", as that term is used in the context of the statute. A social visit to a friends' residence in which incidental outside play is involved does not constitute an

"outdoor recreational use" of the property as that term was contemplated by the legislature. If Julie Neal brought motorcycles to Defendant's property intending to use them on Defendant's property, then perhaps it could be argued that the statute would be applicable. The legislative history of the statute and of the preceding enactments of the statute indicate that there is no intention to apply the statute to incidental outdoor activities in the course of a social visit.

Third, the RUA does not apply to residential premises. The Court of Appeals in *Thone v Nicholson, 84 Mich App 538, 553; 269 NW2d 665 (1978)* refers to the application of the statute to "recreational lands". *Thomas* case and those following *Thomas* refer to the statute as intended to open vast areas of vacant land. The Court of Appeals in *Danaher v Partridge Creek 116 Mich App 305, 311; 269 NW2d 665 (1978)* found that the statute was intended to apply to property which "by its very outdoor nature, would be subject to use by members of the general public for recreational purposes..."

This application of the statute can be derived directly from the words of the statute. The outdoor recreational uses listed, such as hunting, fishing, camping, hiking, and motorcycling are not land uses typically associated with residential property. The Courts of this state in interpreting the statute have found the character of the land is a factor to consider. *Wymer v Holmes*, 429 Mich 66, 76 412 NW2d 213 (1987). See also *Danaher v Partridge Creek, 116 Mich App 305, 31; 323 NW2d 376 (1982)* The legislature's concern over the liability of a land owner who agrees to allow a troop of Boy Scouts to camp on his or her land is not be extended to alter a plaintiff's recourse or the liability of the residential owners who

allow their child to invite another neighbor child to sleep in a tent in the backyard over night.

Plaintiff-Appellee submits that the plain language of the RUA precludes its application to this case. Proceeding to Defendant-Appellant's argument with regard to the interpretation is moot. Notwithstanding, for the purposes of this submission, the application of legislative analysis and Wymer has been briefed.

2. LEGLISLATIVE ANAYLSIS AND WYMER APPLICATION

In construing the statute the Michigan Supreme Court recognized:

> . . . this Court must read the language of the statute in light of the general purpose to be accomplished. Amendatory acts are not to be considered in isolation, but are to be construed in the context of the act, which it is designed to amend. Fowler v Chiropody Bd, 374 Mich 254, 257 132 NW2d 82 (1965); Conrad v Nall, 24 Mich 275, 277 (1872); Advisory Opinion re constitutionality of 1972 PA 294, 389 Mich 441, 478; 208 NW2d 469 (1973).
>
> *Wymer v Holmes*, 429 Mich 66, 76 412 NW2d 213 (1987)

The *Wymer* court through legislative analysis concluded:

> The legislative purpose of the recreational land use statute and its two predecessor statutes, as well as other interpretative aids, also indicated that the Legislature intended the act to apply specifically to certain enumerated outdoor activities (fishing, hunting, trapping, camping, hiking, sightseeing, motorcycling, snowmobiling) which, ordinarily, can be accommodated only on tracts of land which are difficult to defend from trespassers and to make safe for invited persons engaged in recreational activities. The commonality among all these enumerated uses is that they **generally require** large tracts of open, **vacant land** in a relatively natural state. This fact and the legislative history of the RUA make clear to us that the statute was intended to apply to large tracts of undeveloped land suitable for outdoor recreational uses. Urban, suburban, and

> subdivided lands were not intended to be covered by the RUA. The intention of the Legislature to limit owner liability derives from the impracticability of keeping certain tracts of land safe for **public use**.
>
> *Id.* at 79. (Emphasis added.)

The Supreme Court also reiterated the legislative purpose of the RUA in *Wymer* citing *Thomas v Consumers Power, supra:*

> A legitimate state objective in ***promoting tourism*** and in *opening up and* ***making available*** *vast areas of* ***vacant but private lands*** *to the* ***use of the general public***. [Emphasis added.]
>
> *Id.* at 79. (Emphasis added.)

Succinctly stated, *Wymer* held:

a. RUA is not intended to restructure common-law premise liability[3];

b. The legislative intent of RUA is to promote tourism and to encourage owners of large tracts of undeveloped land suitable for recreational purposes, which are difficult to defend from trespassers and to make safe to open up their land for members of the public to engage in recreational activities.[4]

c. RUA does not apply to urban, suburban, and subdivided lands.[5]

d RUA does not apply to social guests injured in urban or suburban areas.[6]

e. In determining liability of a property owner the focus is:

   1. The character of the land; and

   2. The purpose of the person going on the land is central.

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[3] There is not evidence that the Legislature intended a major restructuring of Michigan common law liability. *Wymer* at 79. Otherwise, it would apply to all private property including backyards.

[4] See also *Thomas v Consumers Power Co, supra.*

[5] The Court in *Ellsworth v Highland Lakes*, 198 Mich 55 (1993) defined "suburb" as an outlying part of a city or town; a smaller place adjacent to or sometimes within commuting distance of a city; the residential area on the outskirts of any city or large town.

[6] See also *Harris v Vailliencourt*, 170 Mich App 740 (1988); *Glittenberg, supra, Forche, supra.*

Recently, the Michigan Supreme Court made it crystal clear that the RUA was not designed to limit liability in residential backyards. *Ballard v Ypsilanti Twp*, 457 Mich 564; 577 NW2d 890 (1998) footnote 12 citing *Wymer*, *supra*. Similarly, the Court of Appeals in *Glittenburg v Wilcenski*, 174 Mich App 321; 435 NW2d 480 (1989) and *Forche v Gieseler*, 174 Mich App 588; 436 NW2d 437(1989) held that RUA did not apply to backyards.

The *Forche* court, which stated:

> . . . Our Supreme Court held the RUA inapplicable to premise liability claims brought by social guests for recovery of personal injuries that occur in urban and suburban areas. *Wymer v Holmes*, 429 Mich 66; 412 NW2d 213 (1987). .
>
> Id. at 593. (Emphasis added).

In addition, the *Forche* Court made it clear that the RUA did not eviscerate the traditional premises liability standards as set forth in *Preston v Sleziak*, 383 Mich 442; 175 NW2d 759 (1970) after finding that the RUA did not apply to social guests.

3. DEFENDANT'S FOCUS ON RELATIVELY NATURAL STATE IGNORES THE FACTS AND LAW

The crux of Defendant's application is based on the interpretation of "relatively natural state. As briefed above, Defendant ignores two important facts 1) the purpose of Plaintiff going to Defendant's home; 2) the specific purpose that Defendant's land is applied is not recreational but residential use. These preclude the need for the Court to address this issue.

Defendant also ignores the plain and important language and the totality of the context of the passage he cites from *Wymer*.

> The **commonality** among all these enumerated uses is that they **generally require** large tracts of open, **vacant land** in a relatively natural state. This fact and the legislative history of the RUA make clear to us that the statute was intended to apply to large tracts of undeveloped land suitable for outdoor recreational uses. Urban, suburban, and subdivided lands were not intended to be covered by the RUA. The intention of the Legislature to limit owner liability derives from the impracticability of keeping certain tracts of land safe for **public use**.
>
> *Id.* at 79. (Emphasis added.)

The Wymer court was simply noting the commonality of the enumerated purposes generally require large tracts of open, vacant land in a relatively natural state The Defendant completely ignores the fact that his land is not vacant and has been developed and maintained by him for over a decade. (See Exhibits 8, 9, 10)

Similarly, Defendant's analysis of *Wilson v Thomas L. McNamara, Inc*, 173 Mich App 372; 433 NW2d 851 lv app den, 433 Mich 872 (1988) is misplaced. *Wilson* held that when determining the applicability of the RUA the focus is on the use of the land where the plaintiff was injured and whether it remained in a relatively natural state or had been developed and changed in a manner incompatible with the intention of the RUA. In *Wilson, supra* a child drown in man-made pond used for a ski school on an otherwise undeveloped parcel of land. On this property Plaintiff was injured on property, like Defendant's, that was developed and was not open to the public for recreational use. The court held that the RUA did not apply because 1) plaintiff was hurt on a small developed area of the property that could be easily monitored and supervised for safety and hazardous conditions[7]; 2) limiting defendant's liability would

[7] See also *Wymer, supra at 79* "The same need to limit owner liability does not arise in the case of recreational facilities which, in contrast, are relatively easy to monitor for safety hazards."

do little to promote tourism or open up undeveloped land for use of the general public; and 3) the land was in urban, suburban and subdivided area.

The uncontroverted facts in this case under the standard enunciated in *Wymer*, *supra* include:

CHARACTER OF DEFENDANT'S LAND

a. Plaintiff was injured on the lawn area Defendant routinely maintained, mowed and landscaped in the backyard as well as the wooded area. In fact, Defendant cut the lawn in the area of Plaintiff's injury earlier that same day as well as trimmed the woods. Plaintiff was not injured in the wooded area, the ravine or any undeveloped area. (Exhibit 1, Wilkes 26-27, Plaintiff 15:1-4; 66, Sanchez Affidavit, McNure Affidavit).

b. Defendant's backyard is private property that is not open to the public for recreational purposes.

c. Defendant's residential home and backyard is located in Dimondale, just 6 miles from the state capital in Lansing and in an area where the land is subdivided. Defendant's land is surrounded by several residential homes.

d. Defendant's backyard, in particular the area where Plaintiff was injured, is not difficult to maintain, monitor, make safe or protect from trespassers.

In this case, limiting the Defendant's liability through application of the RUA would do little to promote tourism or open up and make available vast areas of vacant, undeveloped land to the use of the general public. Moreover, the area where Plaintiff

was injured was on Defendant's lawn in his backyard. This area, by Defendant's own admission, is routinely maintained and manicured and it is easy to supervise and monitor for safety hazards. (Exhibit 1, Wilkes 26-27, Plaintiff 15:1-4; 66, Sanchez Affidavit, McNure Affidavit) Defendant's well-groomed backyard is in a residential area, which is a stone throw from Lansing, goes well beyond the purview, intent and purpose of the RUA, which does not apply, to a person on the land for the purpose of a social visit.

Finally, given the facts in this case the gross negligence exceptions should apply as well. "Gross negligence" in avoidance of the immunity granted by RUA is defined as conduct so reckless as to show a substantial lack of concern for whether an injury results. *Kruse v Iron Range Snowmobile Club*, 890 F. Supp 681, affirmed 89 F3d 834 (WD Mich 1995). Gross negligence exists where there is 1) knowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to another, 2) ability to avoid resulting harm by ordinary care and diligence and, 3) the omission to use such care and diligence to avert the threatened danger.

In this case respectively: 1) Wilkes knew about the ridges, by his own admission. (Defendant Deposition pp. 26-27) Plaintiff stated that she didn't know how to ride the bikes (Sanchez Deposition12:25), you can't see the ridges and you have to standup to take them when you are riding. (Sanchez Deposition pp. 45:20 - 46:3). Defendant Wilkes knew this, he uses a rider mower on it (Defendant Deposition pp. 26:14) and he could have warned Plaintiff about them, and; 3) Wilkes did not say anything about these ridges to Plaintiff by his own admission. (Defendant Deposition p. 28:19-22)

4. CONSTITUTIONALITY UNDER THE TITLE OBJECT CLAUSE

The title of the Recreational Land User Statute reads:

> An act restricting suits by persons coming upon the property of another for certain purposes; and to declare the limited liability of owners of property within the state.

Article IV, Section 24 of the 1963 Michigan Constitution states:

> No law shall embrace more than one object, which shall be expressed in its title. No bill shall be altered or amended on its passage through either House so as to change its original purposes determined by its total content and not alone by its title.

In *Thomas, supra* the Court acknowledged the argument that the Recreational Land User Statute violated the title-object clause in the Michigan Constitution, but found it unnecessary to decide the question.

Plaintiff-Appellee contend that if this Court accepts Defendant-Appellants construction of the statute and reads into the statute the sweeping application sought by Defendant-Appellants, the statute would be in violation of the title-object clause of the Michigan Constitution. Defendant-Appellants overbroad application of the statute to any injury occurring upon any property while outdoors is far beyond the scope of the title of the statute which states the object of the statute "restricting suits by persons coming upon the property of another for certain purposes".

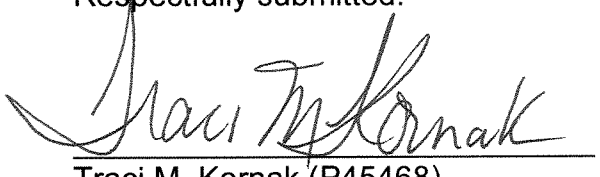
The purpose of Article IV, Section 24 of the Michigan Constitution is to ensure that the legislature in passing laws is fairly notified of the scope Statute and that the legislature and public might understand from the title that only provisions germane to the expressed object would be enacted. *People v Carey,* 382 Mich 285, 296; 170 NW2d 145 (1969).

Plaintiff-Appellee contends that the statute, as property construed by the Court of Appeals below is constitutional. Indeed, acts of the State Legislature are presumed to be constitutional until the contrary is shown. *Benson v State Hospital Commission,* 316 Mich 66, 75; 25 NW2d 112 (1946). Defendant-Appellant' construction of the statute which seeks to ignore the purpose of going on the land and use of the land and add purposes onto the statute not envisioned by the legislature at the time of its enactment, would create an object so broad within the statute that it is no longer expressed in the title, therefore rendering the statute unconstitutional. Applying the Recreational Land User Statute to every outdoor activity would not be germane to the object expressed in the restricting of suits by persons who come upon the property of another "for the purpose of". The "object" of the statute must be germane to the statute's title. *Loomis v Rogers,* 197 Mich 265, 271; 163 NW2d 1018 (1917), *People v Milton,* 393 Mich 234, 247; 224 NW2d 266 (1974).

REQUESTED RELIEF

WHEREFORE, the Plaintiff-Appellee respectfully requests that this Honorable Court deny Defendant-Appellant's application, affirm the decision of the Court of the Appeals, and remand this case to Circuit Court for trial.

Respectfully submitted:



Dated: 8/29/03

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